No. 16400

United States
Court of Appeals
For the Ninth Circuit

ELSIE SUMMERS,

Plaintiff-Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS,
HUBERT E. BONEBRAKE and LEWIS B.
HUNTER, a co-partnership, and
HUBERT E. BONEBRAKE, M.D., Individually,

Defendants-Respondents.

APPELLANT'S BRIEF

Appeal from the United States District Court of Idaho
Northern Division.

JAMES W. INGALLS,
residing at Coeur d'Alene, Idaho
DOEPKER & HENNESSEY,
residing at Butte, Montana
M. J. DOEPKER,
M. F. HENNESSEY,
Attorneys for Appellant.

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APPELLANT'S BRIEF

Appeal from the United States District Court of Idaho Northern Division.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

"Diversity of citizenship: amount in controversy

"a. The District Court shall have jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and is between

"1. Citizens of different states:

"2. . . .

"3. . . .

"b. . . .

28 USCA 1332.

Paragraph I of the Plaintiff's Complaint (p. 3, Par. I, Tr.) alleges:

> "That plaintiff, Elsie Summers, is a citizen and resident of the State of Montana; that defendants are citizens and residents of the State of Idaho; that the amount involved in this controversy exclusive of interest and costs, exceeds the sum of $3,000.00."

which allegation is admitted in the defendants' Answer, except the residence of Elsie Summers (p. 10, Par. I, Tr.).

Statutory provision allowing appeals 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

This is a mal-practice case. The Defendants are physicians engaged in the practice of medicine as co-partners. On March 28, 1951, the Defendant, Hubert E. Bonebrake, performed an operation upon the Plaintiff, removing her uterus and appendix and repairing her vagina. In so doing, a curved surgical needle was left within the abdomen of the Plaintiff.

Plaintiff continued to consult the defendant physicians and remained in the care of the said physicians up to and including July 30, 1955. During the period from March 28, 1951, and July 30, 1955, the Plaintiff returned to the Defendants on numerous occasions complaining of severe pain, a soreness, and agony in the area where they had operated upon the Plaintiff, and submitted herself to them for examination, and the said Defendants failed to use the facilities available to them and failed to discover the said surgical needle.

Thereafter on the 5th day of August, 1955, the plaintiff consulted one Dr. R. W. Cordwell at Kellogg, Idaho, who

discovered the existence of the foreign body in the abdomen of the plaintiff.

On or about February 11, 1956, the plaintiff consulted one Dr. MacPherson in Butte, Montana, who advised the removal of the needle and directed her to Dr. Bonebrake for an operation to remove the needle; which operation was performed on February 23, 1956.

The complaint of the plaintiff was filed in the United States District Court of Idaho, Northern Division, on July 29, 1957. To the Complaint, the defendants directed a Motion to dismiss for failure to state a claim upon which relief could be granted and upon the ground that the action as appeared from the face of the Complaint was barred by the Statute of Limitations. The Court denied the said motion. The defendants then answering, alleging as an affirmative defense that the Statute of Limitations for the bringing or maintaining of the said action had run on the 26th day of March, 1953.

Prior to the trial of the said case, defendants moved the Court that evidence during the course of trial and any right of recovery be restricted and limited to those acts which occurred within two years of the institution of said suit, or between July 30, 1955, and July 30, 1957, which motion was overruled without prejudice.

On trial of the said case on November 12, 1958, the Court restricted the evidence of the plaintiff to acts of negligence on the part of the defendants occuring between July 30, 1955, and July 30, 1957. The only evidence of treatment of plaintiff between said dates being the removal of a needle which the plaintiff did not allege or testify was performed in a negligent manner. Upon motion of the defendant, the Court instructed the jury to return a verdict for the defendants.

STATEMENT OF POINTS TO BE ARGUED

Plaintiff-appellant claims that the Court erred:

(1) In granting the defendants' motion to direct the jury to render a verdict for the defendant (p. 162-164, Tr.).

(2) In directing the jury to render a verdict for the defendants as follows:

> "Ladies and gentlemen of the jury, it appears from the evidence in this case that there has been no act of negligence shown against the Wallace Hospital and the Doctors here since July 29, 1955. Under the law people are not allowed to have an action of this kind and let it lay dormant for such a long time. Plaintiff here is complaining about an operation in 1951, and the last treatment, it is admitted, that she received from these Doctors in connection with this first operation was prior to July 29, 1955. The operation where they removed the needle later,—there is no contention on the part of the plaintiff that there was any negligence in that operation. That operation was satisfactory in every way. So there is only one thing that is left open to me and that is to advise the jury to find for the defendants in this case. The Clerk will hand you a verdict. There will be no necessity for you to retire. I will appoint Mr. Rich as foreman of the jury and he may sign the verdict."
>
> P. 164, Tr.

(3) In entering judgment that the plaintiff take nothing by her complaint (p. 16 & 17, Tr.).

(4) In restricting and limiting the evidence of plaintiff to acts or actions of defendants which occurred within two years from the institution of suit, or between the dates of July 30, 1955, and July 30, 1957 (p. 162, Tr.).

(5) In rejecting plaintiff's offer in evidence of plaintiff's Exhibit Number One, which is set out in the Transcript on Pages 155 through 156, as follows:

"Q. There is being shown to you at this time, Mrs. Summers, an object, and the paper that it is attached to has been marked 'Plaintiff's Exhibit 1'. Will you state what that is?

"A. It is a surgical needle.

"Q. You have been testifying about a needle that was handed to you by Doctor Bonebrake?

"A. Yes.

"Q. And is that the needle that was handed to you by him?

"A. Yes.

"Q. As the needle that had been removed from you?

"A. Yes.

"Q. Have you done anything with it except keep it since that time?

"A. I have not.

"Mr. Doepker: We offer it in evidence.

"Mr. Miller: Objected to as incompetent, irrelevant and immaterial. There is no contention in the complaint, or allegation in the complaint, that the needle was wrongfully removed.

"The Court: There is no allegation of any negligence on the part of the Doctor in removing this needle. The objection will be sustained."

(6) In sustaining defendants' objections to testimony relating to acts of negligence of the defendants prior to July 30, 1955, which testimony and the objections and rulings are hereinafter quoted:

"Q. Did something unusual, or did something happen in the year 1951?

"A. Yes.

"Q. Relate briefly to the jury what that was, referring to the early part of the year 1951?

"A. Well, around in 1951 I was menstruating and I seem to wouldn't quit and I just kept on and kept

on, and so I got a very severe backache through this menstruation and so I went to the Doctor in Wallace, Idaho, and—

"Q. All right now, up to that point—before this time who had been your family physician?

"A. Doctor Bonebrake.

"Q. Is that Doctor Hubert E. Bonebrake, one of the defendants here?

"A. That's right.

"Q. And during that period of time, where was he practicing?

"A. Wallace, Idaho.

"Q. And were there other Doctors there at this same Wallace Hospital?

"A. Yes.

"Q. That you had occasion to consult?

"A. Yes.

"Q. Do you remember their names?

"A. Yes.

"Q. Will you tell the Jury what they were?

"A. Doctor Hunter and Doctor Ellis.

"Q. Now, Mrs. Summers, you have related this matter that you have thus far told the Jury, now, you went to who, in connection with this trouble you were having?

"Mr. Miller: To which we object, your Honor, on the ground that it is immaterial, not being within the time period of July 30, 1955, and July 7, 1957.

"The Court: The objection will be sustained.

"Q. Now, then Mrs. Summers, at the time that you were in the—the time that you went to the hospital in 1951, what, if anything was done?

"Mr. Miller: Just a minute, now, your Honor, I renew my objection that this testimony is incompetent and immaterial to any issue in this case. The inclusive dates are July 30, 1955, up until July 30, 1957.

"Mr. Doepker: Your Honor made a ruling on that previously.

"The Court: I made a ruling on that but I made a ruling on the complaint, the complaint was very indefinite. I made the ruling on the complaint, that the statute did not start to run until the date of the last treatment by the defendants here. In other words, that the date of the first operation would not be controlling and that as to her continuous treatment, it would be at the end of her continuous treatment. The Idaho Supreme Court has ruled a little differently in a great many decisions on it. This case depends on this question; When did she receive the last treatment from these Doctors, and until that is established I would have to sustain the objection."

P. 153-154, Tr.

"Q. Now, Mrs. Summers, what was the start of this episode with Doctor Bonebrake, going back to the start that you were treating with him during this period of time?

"Mr. Miller: To which I object, your Honor, as being incompetent, irrelevant and immaterial. There is no showing here that there has been any treatment by Doctor Bonebrake or the other defendants within the two-year period between the filing of the action and July 30, 1955.

"The Court: The objection will be sustained."

P. 159—Tr.

(7) In rejecting plaintiff's offer of proof (p. 163, Tr.).

(8) In granting in affect or in fact the defendants' motion to limit evidence dated November 5, 1958 (p. 13 & 14, Tr.).

(9) In holding the recovery for acts of negligence of the defendants prior to July 30, 1955, was barred by the statute of limitations (p. 164, Tr.).

SUMMARY OF ARGUMENT

The sole issue in this case is as follows:

> When does the statute of limitations begin to run where there is a continuation of treatment by the negligent physicians; at the time of the initial negligent act, upon termination of the patient-physician relationship, upon the discovery of the negligence?

The plaintiff-appellant submits that where the patient-physician relationship continues until discovery of a foreign body within his patient and the patient continues to submit herself to the physician for treatment and examination, complaining of pain and suffering in the area of the operation and the physician fails to discover the existence of the foreign body within the body of the patient, the statute of limitations does not begin to run until the discovery of the foreign body or until the operation is completed by the removal of the foreign body.

Plaintiff-appellant further submits that the best reasoned and fairest rule is that the statute of limitations does not commence to run until the patient has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered it.

Plaintiff-appellant submits that under the facts of this case under either theory as to when the statute begins to run, the continuing patient-physician relationship theory, or the discovery theory, plaintiff's case is not barred by the Idaho statute of limitations.

ARGUMENT

Under the theory of continuing negligence, the statute of limitations has been held to have been tolled as long as the patient-physician relationship continues:

> "Ordinarily a case of action for mal-practice occurs at the time of the negligent act or omission and the limitation runs from that date. In case of continued negligent treatment, however, limitations may run from the date of the last treatment rather than from the original act of mal-practice."
>
> 54 CJS, Section 174, page 142.
>
> "The mere fact that treatment continues after the original act does not toll the Statute of Limitations, but where the injurious consequences arise from a course of treatment, limits do not begin to run until treatment is terminated unless the patient discovered or should have discovered the injury before that time, the mal-practice being regarded as a continuing tort and the fact that a substantial portion of the injury resulted before completion of the treatment will not permit interposition of the bar of the statute as to such injury."
>
> 54 CJS, Section 174, page 143.
>
> "Where the surgeon continues treating the patient following the operation, the failure to remove the foreign subject during the period of subsequent treatment has been regarded as continuing negligence, that the actions accrue only at the conclusion of the treatment and suit may be brought at any time within the limitation period following the termination of treatment, even though the original act of negligence would have been barred."
>
> 54 CJS, Section 174, page 144.

A discussion regarding leaving a sponge in the abdominal cavity appears on Page 897, 37 CJ, Section 259:

> "Where a physician and surgeon operates upon a patient for what he pronounces to be appendicitis and

neglects or carelessly forgets to remove from the abdominal cavity a sponge which he had placed therein, and this condition continues during his entire professional relation to the case and is present when he abandons or otherwise retires therefrom, the statute of limitations does not begin to run against a right to sue and recover on account of such want of skill, care, and attention, until the case has been so abandoned or the professional relation otherwise terminated."

Sly v. Van Lenger, 120 Misc. 420, 198 NYS 608;

Gillette v. Tucker, 67 Oh. St. 106, 127, 133, 65 N E 865.

This theory has been adopted by the law of the State of Idaho by this Honorable Court:

Moore v. Tremelling 100 Fed. 2d 39.

The negligence of the physician in failing to remove a foreign object left in the patient is continuing and the limitation period does not commence to run until the termination of the treatment.

Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 SE 365;

Hahn v. Claybrook, 100 Atl. 83, L.R.A. 1917C 1169;

DeHahn v. Winter, 258 Mich. 293, 241 N.W. 923;

Schmit v. Esser, 183 Minn. 354, 236 N.W. 622;

Williams v. Elias, 140 Neb. 656, 1 N.W. 2d 121;

Bowers v. Santee, 99 Ohio State 361, 124 N.E. 238;

Hotelling v. Walther, 130 P. 2d 944;

Peteler v. Robison, 81 Utah 535, 17 P. 2d 244.

"The foregoing authorities, in our opinion, announce a just and most equitable rule, and we are disposed to follow them. The case now before us is much stronger than either of the cases from the New York

and Ohio courts. In each of those cases, the negligent act consisted in not removing the sponge from the body of the patient at the time of the operation. It might be well said that the negligence involved in those cases occurred in the performance of the operation. In the present case the operation, up to the closing of the wound and the leaving of the drainage tube therein, was entirely proper. The negligence occurred thereafter, by reason of the surgeon neglecting to remove the tube left in the patient's wound after it had served its purpose. This negligence continued during the entire time the tube was left in the body of the patient, and only ended upon the removal of said tube. With much greater reason than that which prompted the Ohio and New York courts to hold as they are shown to have done, cannot this court now hold that the surgeon's negligence continued up to the removal of said tube, and that the appellants' cause of action then accrued and would not be barred until one year thereafter? Such is the holding of this court which necessitates the overruling of the case of Gum v. Allen, supra.

"There is another principle supported by eminent authority upon which it might be held that appellants' cause of action is not barred, and that is, that an operation like that performed upon Mrs. Hysman is not complete until the wound has been closed and all appliances used in the operation have been removed."

Hysman v. Kirsch, 57 P. 2d at page 908.

"When does the treatment cease? So long as the relation of physician and patient continues as to the particular injury or malady which he is employed to cure and the physician continues to attend and examine the patient in relation thereto and there is something more to be done by the physician in order to effect a cure, it cannot be said that the treatment has ceased."

Schmit v. Esser, 183 Minn. 354, 236 NW 622.

This would appear to be a reasonable rule because so long as the patient is under the care of the physician and

the physician in the exercise of ordinary care should have discovered the condition that is causing damage to the patient, the patient should not be held to the duty of starting a suit against the doctor. Adoption of a contrary rule would penalize the patient for his confidence in the doctor and reward the physician for failure to discover what he should have discovered or for his non-disclosure of facts which he only had the knowledge to possess. In the case at bar the plaintiff, Mrs. Summers, continued in the care of the defendant doctors at all times until the needle was removed. The operation which they performed upon her was not complete until the removal of the needle. When the patient learned of the cause of her continued illness she returned to the defendant physicians so that they could complete the operation by removing the needle.

In some jurisdictions regardless of the continuation of the patient-physician relationship, the courts have held that the statute of limitations does not begin to run until the patient knows or in the exercise of reasonable diligence should have known of the injury and the cause of disability.

> "In some jurisdiction an exception to the general rule founded on the ignorance of the patient of the disability is recognized so that limitations do not run until the patient knows or with the exercise of reasonable diligence should know of the injury or cause of the disability."
>
> 54 CJS Section 174, page 143.

> "In any event, it has been held that the limitations run from the date on which the patient became chargeable with notice of the fact of mal-practice."
>
> 54 CJS, Section 174, page 143.

"If a foreign substance is negligently left in the human body by a defendant, the statute of limitations does not commence to run until the plaintiff has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered."

Pellette v. Sonotone Corp., 55 CA 158 130 Pac. 2d 181;

Ehlen v. Burrows, 51 CA 2d 141, 124 Pac. 2d 82;

Bowers v. Olch (Cal. 1953) 260 Pac. 2d 997;

Agnew v. Larson (Cal. 1947) 185 Pac. 2d 851;

Costa v. Regents of the University of California (Cal.) 254 Pac. (2d) 85;

Winkler v. So. Cal. Perm. Med. Grp. (Cal. 1956) 297 Pac. 2d 728.

The rule announced by these jurisdictions would seem to be the most reasonable, fair, and just. We cannot conceive why a person should be charged with the duty of bringing action when he does not know that he has a cause of action and would not know that he sustained an injury for which he was entitled to redress.

This rule would seem to be more just than the rule requiring the continuation of the physician-patient relationship as it recognizes that the injury may progress after the abandonment of treatment or may only be discovered after continued and lengthy consultations with other surgeons. Under the other rule one might be denied redress because of a negligent examination or diagnosis of another physician or because of the other physicians loyalty to his brethren of the profession.

Counsel respectfully submits that under either of the modern rules or exceptions preventing the running of the statute when the original negligence occurs, the court er-

red in its ruling regarding the statutes of limitations and upon its instructions to the Jury.

Counsel urges, however, that the best and most just rule in such cases as at bar, is that the statute be tolled until discovery or until the plaintiff should have in the exercise of ordinary diligence discovered the injury or cause of injury as any other rule would encourage and reward the careless, unconscionable, and unscrupulous.

Respectfully submitted,

JAMES W. INGALLS,
Residing at Coeur d'Alene, Idaho

DOEPKER & HENNESSEY,
M. J. DOEPKER,
M. F. HENNESSEY,
Butte, Montana,
Attorneys for Appellant.

Service of the above and foregoing Brief of Appellant is hereby admitted and copy is received this........................ ....day of September, 1959.

HAWKINS & MILLER,

By ......s/ E. L. Miller..................

Attorneys for Defendants and Appellees.